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No. 84-445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FIRST ASSEMBLY OF GOD CHURCH, *et al.*,

Petitioners,

v.

CITY OF ALEXANDRIA, VIRGINIA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Respondents do not accept the Questions Presented by the petitioners. Rather, the respondents suggest that the only questions are:

1. Whether petitioners' religious belief concerning the need to provide for their childrens' education mandates an exemption from a valid, neutral, and generally applied zoning ordinance that limited the size of the student population in and required the erection of privacy and noise-abatement fencing around a week-day school in a residential area.

2. Whether petitioners are estopped from challenging zoning regulations under which they have accepted benefits for twenty years, particularly when they proposed some of the very regulations, in the way of permit conditions, which they now challenge.

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COUNTERSTATEMENT OF THE CASE

This case involves a church's challenge to the City of Alexandria's zoning scheme *after* the church had applied for and received a zoning permit to operate a weekday school on its present grounds in a residential neighborhood of single family homes. The Church was not excluded from the City or from any zone in the City. The Church objects to conditions, most of which it had recommended itself, which the City made part of the use permit granted. The conditions imposed were similar or identical to ones imposed on other church and secular private schools in the City.

After accepting the permit it had sought and opening the school, petitioners brought an action in the United States

District Court for the Eastern District of Virginia challenging the zoning scheme and the specific permit in a twenty-four page complaint.

The original complaint contained over a dozen separate charges of unconstitutionality, ranging from freedom of religion, to taking without compensation, even to search and seizure. The district court refused petitioners' motion for a preliminary injunction. Later, the court, as petitioners note, granted respondents summary judgment after a considerable amount of discovery had occurred. The discovery, only part of which is presented in the petition, revealed undisputed facts which do not support the various claims which petitioners have unsuccessfully asserted in two federal courts.

Among some of the most important facts which petitioners omitted were those which explained the place weekday education has in petitioners' religious practices. The General Council of the Assemblies of God, with which petitioner First Assembly is associated, has promulgated a "Statement of Fundamental Truths" describing its beliefs. There is no reference in this document or any of the Church's guiding documents to a weekday church school or the convictions of education claimed by the Church in the litigation (Jt. App. 466, 496). There is similarly no reference in the Church's writings or in petitioners' depositions to any religious belief regarding the size of school populations or noise abatement, privacy fences.

The decision whether to operate day schools is left for each congregation of the First Assembly of God, and not all congregations choose to do so. There is no unique significance to the present location of the Church, as it has been situated in three other places in the City (Jt. App. 501). The Church did not operate a day school in its previous locations from 1919, when it was founded, until 1982, when the Church's current pastor determined to operate a school. That decision, it should be noted, was subject to a vote by the congregation.

A member of the Church cannot be disciplined under First Assembly's Constitution and Bylaws for sending children to a public school or a school not affiliated with First Assembly (Jt. App. 409-11). Some parents, including the pastor, admitted to

sending their children to public schools for part of their children's education and to another First Assembly school located in an adjacent town. They switched to petitioners' school because it was safer or more convenient, not due to any religious reason. (Rec. Vol. III).

While petitioners acknowledge making three different applications for their permit, they fail to note that *they* included in these applications a number of limitations intended to minimize the impact of the school on the neighborhood: hours of operation would be limited; hours of outdoor play would be restricted; the number of children outside would be limited; the public road would not be used to drop off students or make deliveries; the Church would make its driveways one-way in and out; the school would maximize carpooling of students; and the school would use trees and bushes to buffer noise from neighbors' property (Jt. App. 508, 510, 522-24, 534).

During the City's consideration of the First Assembly's applications, the Church amended its requested permit by (1) reducing planned enrollment to ninty-eight students; (2) including construction on the border of the property of a combination shrubbery and privacy fence to reduce visual and noise impact from children playing on the grounds; and (3) including car-pooling by the parents (Jt. App. 544-47). Again, all these ideas originated with the Church. The City Council then rejected a recommendation by its own Planning Commission and expressions of strong opposition to the school by the community to approve the permit.

While the Church complains about City inspections of its school after the permit was granted, it does not state, as it should, that no visit occurred unless a specific complaint about a use violation was made and that, on some occasions, City officials came to the Church because they were invited by church officials to do so (Jt. App. 443-44). Indeed, the *only* occasion in which a city official ever went inside the building was when he was specifically asked by the Pastor to do so (Rose Dep. at 135-36).

Respondents argued and the district court found that no religious-based claims were involved in this case because the

City's action, imposing traditional conditions on a special use permit, did not interfere with any of petitioners' beliefs or religious conduct (Pet. App. at 9a). Stripped of these unsupported First Amendment claims, the Church was left to argue that these conditions were "arbitrary and capricious" and violated their right to due process. Given the minimal burden to justify such zoning regulation, this challenge also failed (Pet. App. 9a).

Petitioners then appealed to the United States Court of Appeals for the Fourth Circuit which, agreeing with the City's assertions and the district court's holding, concluded that " . . . the City has neither attacked appellants' religious beliefs nor sought to regulate their conduct and, therefore, cannot be said to have burdened appellants' religious freedom" (Pet. App. at 5a, n.2). Finding no legitimate freedom of religion claim, the court of appeals then upheld the zoning scheme and conditions holding that "[i]t is plain from the face of each of the conditions set forth . . . that [they] are substantially related to the preservation of important municipal objectives, such as traffic and road safety, fire prevention, and noise" (Pet. App. at 5a).

From this decision, completely in line with all precedents, petitioners now seek this Court's review.

REASONS FOR DENYING THE WRIT

The petition for certiorari seeks to create a constitutional confrontation between (i) the rights to freedom of religion and to direct the education of children and (ii) the police power of the state to enforce valid and neutral zoning ordinances enacted to control noise, traffic, and safety hazards. But this case is a most inappropriate one for resolving such a confrontation. Petitioners still have not shown that any of their religious beliefs or practices are in any way impacted by such noise, traffic control, and safety ordinances. Consequently, the balance of competing rights which petitioners assert simply does not exist in this case.

The petition thus reduces itself to the virtually frivolous contention (Pet. at 24) that the conditions imposed by the Alexandria City Council, used by the city for years and suggested in some instances by petitioners themselves, "were arbitrary and capricious and in violation of [the First Assemply's] rights to the equal protection of the law." Equally without merit is the subsidiary claim that the Fourth Circuit refused to consider important constitutional questions and allowed the district court to dispose of the multitude of claims in the complaint without findings of fact and "a thorough discussion of the legal principles applied" (Pet. at 23-25).

Although petitioners cast their plea for certiorari in terms which might be recognized under this Court's rules and precedents—a conflict between the circuits, a decision contrary to this Court's rulings, a case appropriate for this Court's supervisory power—these are little more than labels pinned on petitioners' claim that the courts below were wrong. *See Ross v. Moffitt,* 417 U.S. 600, 616-17 (1974) (Court review depends on factors "other than the perceived correctness of the judgment" below).

As an affirmation of the City's right to impose traditional zoning regulation on the use of land, the Fourth Circuit's decision is completely in line with this Court's and other Circuits' opinions, and there are no issues in this case justifying the grant of certiorari. The petition should, therefore, be denied.

I.

THE FOURTH CIRCUIT'S DECISION UPHOLDING THE CITY'S ZONING LAWS AGAINST FREE EXERCISE, ESTABLISHMENT, AND DUE PROCESS CHALLENGES ACCURATELY APPLIED THE PRECEDENTS OF THIS COURT AND DOES NOT CONFLICT WITH OTHER COURTS OF APPEALS.

Petitioners concede in their very first discussion of applicable precedents that "their right to engage in religious practices or conduct in furtherance of that belief may be subject to

reasonable time, place and manner restrictions in order to 'safeguard the peace, good order and comfort of the community . . .' " (Pet. at 11-12, *quoting Cantwell v. Connecticut,* 310 U.S. 296, 304 (1940)).

Petitioners then leap from this undisputed principle to the assertion that the foregoing always "involves a balancing of the burden on religious activities with the government's interest in enforcing the regulation" (Pet. at 12). However, every incantation of First Amendment rights does not propel a litigant ineluctably to a "balancing." First, and always, the party claiming burden must demonstrate an impact by the regulation at issue on a basic religious belief or a fundamental right. This, as recently noted, is not an easy task. *See United States v. Lee,* 455 U.S. 252, 263 n.3 (1982) (Stevens, J. concurring) (The Court has erected "a standard that places an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) . . . ").

A. This Case Does Not Involve First Amendment Rights In Conflict With Government Authority.

The scrutiny and "balancing" petitioners seek in order to invalidate the City's zoning scheme occur only when the government's action "contravenes the basic religious tenets and practices of the [person's] faith" or "compels [a person] to perform acts undeniably at odds with fundamental tenets of [his] religious beliefs." *Wisconsin v. Yoder,* 406 U.S. 205, 218 (1972). The burden of proving this is placed on the person challenging the government's action, *School District of Abington Township v. Schempp,* 374 U.S. 203, 223 (1963), and as much as they may try, petitioners simply cannot liken their claims to those which were addressed in the Court's principal free exercise cases. *See Wisconsin v. Yoder,* 406 U.S. at 218 (Amish requirement of living separate and apart from society was a "fundamental tenet"); *Sherbert v. Verner,* 374 U.S. 398, 406 (1963) (Seventh Day Adventist's refusal to work on Sabbath was a "cardinal principle"); *Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707, 717

(1981) (Jehovah's Witness' refusal to build armaments based on a "central precept"). What tenets of petitioners' religious faith compel them to conduct schools free from neutral zoning regulations restricting school population at certain locations or requiring noise abatement and privacy fences? The testimony given by petitioners' themselves—other locations used by the Church in the City, no requirement of weekday schools in their religious tenets or written constitutions and by-laws, use of public schools in the past—convincingly shows that there simply is no claim on a par with *Yoder, Sherbert,* or *Thomas* in this case.

Also, any "burden" imposed by the City's zoning laws—costs of complying with enrollment limitation or erecting privacy fence and shrubs—cannot seriously be compared to those in the cases on which petitioners rely—*Yoder* (criminal prosecution), *Sherbert,* and *Thomas* (life threatening economic sanctions). Instead, the costs to petitioners, if any, of complying with the law are attenuated, incidental, and indirect. As such, they do not involve an impermissible burden. *See Braunfield v. Brown,* 366 U.S. 599, *reh. denied,* 368 U.S. 869 (1961).[1]

Contrary to petitioners assertion of a "conflict" (Pet. at 10), the Fourth Circuit's decision is completely in line with the two courts of appeals which have ruled in this area. In *Grosz v. City of Miami Beach,* 721 F.2d 729, 731 (11th Cir. 1983), the

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[1] While never having written an opinion in this precise area, this Court has indicated that zoning laws harsher than those in this case, including those which totally excluded a religious use, do not violate the First Amendment and do not require the kind of balancing asserted. *See Damascus Community Church v. Clackamas County,* 45 Or. 1065, 610 P.2d 273 (1980) (denial of permit to operate school on church grounds) *appeal dismissed for want of substantial federal question,* 450 U.S. 902 (1981); *Allendale Congregation of Jehovah's Witnesses v. Grosman,* 30 N.J. 273, 152 A.2d 569 (1959) (denial of permit to build church when site inappropriate), *appeal dismissed for want of substantial federal question,* 361 U.S. 536 (1960); *Milwaukee Company of Jehovah's Witnesses v. Mullen,* 214 Or. 281, 330 P.2d 5 (refusal to grant permit to build a church), *appeal dismissed for want of substantial federal question,* 359 U.S. 436 (1959); *Corporation of Presiding Bishop v. City of Porterville,* 90 Cal. App. 2d 656, 203 P.2d 823 (churches excluded from all residential zones), *appeal dismissed for want of substantial federal question,* 338 U.S. 805 (1949); *cf. American Communications Ass'n v. Douds,* 339 U.S. 382, 397-98 (1958) (Court explains dismissals in cases cited above).

city's *total* exclusion of churches and synagogues from *all* single family residential zones was upheld by the court of appeals, against a claim made by a rabbi unable to commute easily, because the burden "in terms of convenience, dollars or aesthetics" did not rise to the level of those which had been struck down by this Court. 721 F.2d at 739. In *Lakewood, Ohio Congregation of Jehovah's Witnesses v. Lakewood, Ohio,* 699 F.2d 303 (6th Cir.), *cert. denied,* 104 S.Ct. 72 (1983), the court of appeals upheld the validity of a zoning law which precluded construction of churches in all but *ten percent* of the City because the City's zoning law "does not prohibit the Congregation or any other faith from worshipping in the City . . . . " 699 F.2d at 307. Land on which the church in *Lakewood* could build (or on which petitioners might not need all of the conditions in their permit) might be more expensive, "but the First Amendment does not require the City to make all land or even the cheapest or most beautiful land available to churches." *Ibid.*[2]

Petitioners' attempt to create an excessive entanglement issue fairs no better. As the Fourth Circuit observed below, "the special use permit conditions have a strictly secular purpose: the promotion of public health, safety, and welfare" (Pet. App. at 4a). In so holding, the Fourth Circuit relied on and quoted from this Court's decision in *Lemon v. Kurtzman,* 403 U.S. 602, 614, *reh. denied,* 404 U.S. 876 (1971), which states: "Fire inspections, building and *zoning regulations,* . . . are examples of necessary and permissible contacts" (emphasis added). *See also Larkin v. Grendel's Den, Inc.,* 459 U.S. 116,

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[2] While *Grosz* speaks of "balancing" in the general sense, the *Grosz* court specifically endorsed the Sixth Circuit's rationale in *Lakewood.* 721 F.2d at 740. This loose reference by the *Grosz* court may be the reason for petitioners' misimpressions that the mere assertion of First Amendment rights requires "balancing." Even if petitioners can construe *Grosz* or *Lakewood* to require any balancing, the Fourth Circuit's failure to do so in this case is harmless. The regulation in dispute here—conditioning the use of the church's desired land—is far less severe than the total prohibition in *Grosz* and the near total prohibition in *Lakewood.* The reasons for regulation—protection of the public safety, health and welfare—are the same. Consequently, the result of the case would have been the same no matter which of the courts of appeals' formulations was used.

121 (1983) (" . . . and and there can be little doubt about the power of a state to regulate the environment in the vicinity of schools, churches, hospitals, and the like by exercise of reasonable zoning laws").

Even assuming that petitioners were able to set up the confrontation they desire, no issue important enough for certiorari would be involved. Time and time again, this Court has reiterated that no person can be shielded from all burdens incident to exercising every aspect of the right to practice religious beliefs. Most recently, in *United States v. Lee,* 455 U.S. 252 (1982), this Court ruled that when the followers of a religious sect voluntarily enter into some activity that is subject to valid controls binding on all others engaged in such activity—seeking a land use permit would be a good example—that sect's religious beliefs offer no refuge from such governmental controls. That principle follows from a long line of decisions in this Court. *See, e.g., Reynolds v. United States,* 98 U.S. 145, 166-67 (1879) (polygamy laws); *Davis v. Beason,* 133 U.S. 333, 345 (1890) (bigamy laws); *Jacobson v. United States,* 197 U.S. 11, 26 (1905) (compulsory vaccination laws); *Prince v. Massachusetts,* 321 U.S. 158 (1944) (child labor laws).

B. The Court Of Appeals Reviewed The Zoning Regulation With The Deference Required In Due Process Cases.

Petitioners' remaining argument, that the conditions imposed violated their due process rights, must be viewed in light of this Court's admonition that courts should "refrain from reviewing [zoning decisions] absent a showing of arbitrariness or irrationality." *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265 (1977). Since municipalities have broad authority to utilize land use regulation to meet effectively the increasing encroachments of urbanization upon the quality of life of their citizens, *see Village of Belle Terre v. Boraas,* 416 U.S. 1, 9 (1974), the legislative judgment involved in such regulation is to control "[i]f the validity of the legislative classification for zoning purposes be fairly debatable." *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388 (1926).

As in those cases involving freedom of religion claims, the due process based cases relied upon by petitioners, in which zoning regulation by local governments was voided by the Court, involve *total* bans or prohibitions on the regulated activity. *Compare Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981) (outright prohibition on live entertainment within city limits) *and Schneider v. State of New Jersey,* 308 U.S. 147 (1939) (prohibition on distribution of printed matter on streets, sidewalks and in parks) *with Young v. American Mini Theatres, Inc.,* 427 U.S. 50, *reh. denied,* 429 U.S. 873 (1976) (less than total ban permissible).

Again, petitioners were never able to show this kind of burden or regulation. The remaining theory, that the imposition of conditions on the operation of a school "closely related" to the church *ipso facto* shifts the burden to the City to show compelling interest or that the regulations must be applied in the least restrictive manner, is simply a misstatement of the law. *See Lakewood,* 699 F.2d at 305-06 (consistent court of appeals decision upholding exclusion of churches from ninety percent of city under due process analysis).

C. The Case Involves No Issues Which Trigger This Court's Supervisory Authority.

Petitioners contend that the Fourth Circuit decision "is an extreme departure from the accepted and usual course of judicial proceedings" (Pet. at 25) because the court below "failed to address" many of the issues raised by First Assembly (Pet. at 23) and because the courts below rejected facts asserted by the First Assembly which compelled resolution in their favor. None of these contentions need detain the Court.

Petitioners' appeal to the Court's "supervisory powers" mirrors their claim before the court of appeals that the district court violated the rules of procedure by failing to accept their factual assertions and by failing to make specific findings of fact. Their assertion of error is wrong in any event because, rendering summary judgment, the court specifically was relieved from making the showing petitioners seek. *Lea v. Cone Mills Corp.,* 467 F.2d 277 (4th Cir. 1977). However, even if

that were not the case, "[t]he failure of the Court of Appeals to correct the errors of the District Court . . . ," with respect to factual assertions, does not constitute an extreme departure from accepted judicial procedure such that the exercise of any supervisory power is warranted. The Court has made clear that it "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925). Petitioners cannot identify any overiding principle of federal jurisdiction, *see, e.g., McNabb v. United States,* 318 U.S. 332, 341 (1943) (administration of federal criminal justice system); *Zahn v. International Paper Co.,* 414 U.S. 291, 296 (1973) (supervising class action), which is affected by the court of appeals decision and which rises to the level of this Court's review.

II.

PETITIONERS ARE ESTOPPED FROM CHALLENGING A ZONING SCHEME, THE BENEFITS OF WHICH THEY HAVE TAKEN FOR TWENTY YEARS, AND PERMIT CONDITIONS WHICH THEY SUGGESTED THEMSELVES.

Still another reason to deny the petition is to prevent petitioners from taking unfair advantage. Respondents raised in both the district court and court of appeals the argument of estoppel. As pointed out earlier, petitioners have taken advantage of the City's zoning laws for over twenty years. They sought and were given permits to build the church building in 1963, to build an extension in 1973, and to operate a school in 1982 (Pet. at 3-4). In addition, with respect to the specific permit in question, petitioners were granted their permit, accepted it, and began operating its school for two months before deciding to violate those conditions they unilaterally deemed improper. A party should not be able to take all the advantages of the City's zoning system and then, because of its opposition to two of twelve conditions, be able to attack its validity. As this Court has stated, petitioners "cannot claim the benefits of statutes and afterwards successfully assert their invalidity." *Wall v. Parrot Silver & Cooper Co.,* 244 U.S. 407,

412 (1917); *see also Ashwander v. TVA,* 297 U.S. 288, 348, *reh. denied,* 297 U.S. 728 (1936) (Brandeis, J. concurring). The fact that petitioners' challenge includes constitutional claims does not change this basic principle of fairness. *Wall,* 244 U.S. at 412.

Were this general principle not sufficient, petitioners even more outrageous challenge is to conditions which, in some cases, they suggested the City adopt. Certainly these conditions should be immune from petitioners' attack. *See County of Imperial v. McDougal,* 19 Cal. 3d 505, 564 P.2d 14 (1977), *appeal dismissed for want of substantial federal questions,* 434 U.S. 944 (1977).

CONCLUSION

Consequently, for the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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